Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No._____

In The

Supreme Court of the United States

Oscar L. Thomas, Pro Se

Petitioner,

v.

R. James Nicholson, Secretary, United States Department of Veterans Affairs, in his Individual Capacity, et al

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner Oscar L. Thomas, ("Thomas") is an U.S. Army Retired Senior Non-Commissioned Officer with 25 years of honorable military service, to include wartime service. Upon retirement from military service on July 31, 1989, Thomas, because of his service and the unseen wounds and scars of military service, filed claims for service-connected disability benefits with the Department of Veterans Affairs (VA).

In the processing and adjudication of his claims for those benefits, Thomas claimed that VA employees committed tortuous acts and omissions that caused him serious injury. When the VA failed or refused to properly re-adjudicate his veteran's benefit claims disputes, Thomas appeal his veteran's benefit claims disputes to the Board of Veterans Appeals (BVA) and the Veterans Court through the Veterans Judicial Review Act (VJRA), 38 U.S.C. § 511(a), and for his alleged common law tort claims based on acts and omissions of medical malpractice and other torts, filed civil suit in the United District Court for the District of Columbia.

As explained in the Initial Petition, these claims are now inextricably intertwined constituting a jurisdictional conflict that this Court is being asked to resolve by underlying Writ of Certiorari Number 09-411.

The claims and issues being presented in this second Writ all grew out of claims from an underlying original complaint, (02-cv-1743), now pending for 7 years, into the current case (07-cv-0598). This (07-cv-0598) case was split by the district court's December 11, 2008 Memorandum and Order sau sponte dismissing claims alleged against judicial and non-judicial governmental actors. Claims against those remaining governmental actors, as a result of the split, are still pending before the district court as part of the two underlying cases, DC District Court Civil Actions (02-cv-1743) and (07-cv-0598). Because each of the underlying cases was improperly decided, this Court is being asked to grant Certiorari to consider the correctness of the rulings and to reverse.

1. Whether the district court properly dismissed Petitioner's constitutional and common law tort action against the judges, " because they are absolutely immune from liability for damages for actions taken in the course of their official capacities", and against government officials and federal employees "because they are also immune, when and where it is alleged and shown that they, in fact, had acted without subject-matter jurisdiction, " all jurisdiction" in adjudicating a FTCA case, and where the action was taken clearly outside the scope of their Article III constitutional and federal statutory jurisdictional authority?

2. Whether the named judges were legally required to recuse themselves from the two cases involving Petitioner at the instant each were notified of Petitioner's complaint of judicial misconduct against them; and most certainly when the Petitioner specifically requested the presiding judge in the second case (07-cv-0598) to recuse himself and/or allow Petitioner to file an Amended Complaint naming Judge RJL, the then presiding judge, as a defendant in the case in which he was presiding? And,

3. Whether the District Court Complaint stated a Constitutional Violation?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1, the following list identifies all of the parties appearing here and in the court below.

The Petitioner here and in the United States Court of Appeals for the District of Columbia is Oscar L. Thomas, Pro Se.

The Respondents here and in the United States Court of Appeals for the District of Columbia are:

1) R. James Nicholson, Defendant/Respondent
2) Paul G. Thomason, Defendant/Respondent
3) Ellen S. Huvelle, Judge/Defendant/Respondent
4) Deborah A. Robinson, Judge/Defendant/Respondent
5) Rosemary M. Collyer, Judge/Defendant/Respondent
6) Alan Kay, Judge/Defendant/Respondent
7) Jeffrey A. Taylor, Defendant/Respondent
8) Rudolph Contreras, Defendant/Respondent
9) Richard b. Rosse, M.D., Defendant/Respondent
10) Robin M. Meriweather, Defendant/Respondent

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

* At some point in the litigation, Eric Ken Shinseki was substituted for his predecessors, R. James Nicholson and Erick K. Peake, as Secretary, Department of Veterans Affairs, per Rule 43(c)(2) of the Federal Rules of Appellate Procedure.

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I. Review is warranted because:

A. The district court never acquired Article III Federal Statutory "Subject-Matter Jurisdiction" over Petitioner's FTCA case under provisions of the FTCA and its framework; and because all of the district court's rulings, decisions and opinions grant dismissal and summary judgement to the Defendants/Respondents were improper, as not taken in accordance with District of Columbia, Federal law and Supreme Court Precedence, and are null and void. For this single and very important reason alone, the petition or writ of certiorari should be granted.....13

B. Review is warranted because, in granting motion to dismiss and for summary judgment, the lower court departed from the accepted standard of review set by this Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 68 USLW 4480, (U.S., Jun 12, 2000).....13

C. Review is warranted because the DC Circuit also lacking appellate jurisdiction to review and rule on the merits of this case, improperly sanctioned the district court's dismissal and summary judgment opinion on the issue, standard and application of law for claim accrual, exhaustion of administrative remedies, and expiration of statute of limitation under the FTCA. 28 U.S.C. § 2401(b) in this case.....14

D. Review is warranted because the *Per Curiam* Summary Action Order issued by the 3-Judge Panel of the DC Circuit conflicts with all discernable opinions of all other Circuit Courts, as well as its own discernable opinions that have ever addressed this same important matter or question(s), which is "whether, in this case, the district court had Article III Federal Statutory Subject-mater Jurisdiction to hear/review and/or to adjudicate this Case under the FTCA framework"; that constituted protrusion and unauthorized reviewed an inextricable intertwined veteran's benefit claims and FTCA

claim that "The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans." And, that "The decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise, and because the Order also conflicts affirmations contained in Opinions of this Court.....14, 15

E. The district court's rulings, and the DC Circuit's affirmation, if allowed to stand and become precedence, will have a very chilling and damaging effect on every veteran's rights who may need and has to apply for veteran's disability benefits form the VA, and will constitute and sanction court-intervention, protrusion, intrusion and unauthorized reviewed of inextricable intertwined veteran's benefit claims decisions and FTCA claim at the request of the Secretary himself when "The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans." And, that "The decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise, and because the Order also conflicts affirmations contained in Opinions of this Court.....15, 16

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The Summary Affirmance Order of the DC Appellate Court affirming the opinion of the district court whose

review is sought is reproduced in the Appendix at A-1 - A-3 and unreported.

The District Court's Memorandum Opinion of Dismissal December 11, 2008, Dismissing Defendants/Respondents is reproduced at A-4 - A-5 and is unreported.

JURISDICTION

Jurisdiction is proper in this Court. The U.S. District Court for the District of Columbia judgment sought to be reviewed was entered on December 11, 2008. Subsequently, on January 5, 2009, the trial judge denied a Motion for Reconsideration.

Jurisdiction of this Court is invoked under rule 10(c) which provides that review should be granted when the court below "has decided an important question of federal law which has not been, but should be settled by this Court..." Supreme Court Rule 10(c).

The District of Columbia Court of Appeals for the District of Columbia Circuit affirmed the district court judgment by Summary Affirmance Order entered on August 19, 2009. No Petition for Rehearing and Rehearing En Banc was filed because a Petition as to the underlying related DC Circuit Opinion, Action # 09-4359 and appealed to this Court by Writ and is Docketed as No.: 09-411.

The present Petition for Writ of Certiorari is filed within 90 days of the District of Columbia Circuit's Affirmance Order of the District Court's Opinion of Dismissal of August 19, 2009, and is timely pursuant to 28 U.S.C. §§1257 and 2101(c) and Rule 10(1)(c) of the Rules for the U.S. Supreme Court.

The jurisdiction of this Court to review the Judgment of the DC Circuit is invoked under 28 U.S.C. § 1254(1).

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STATEMENT OF THE CASE

Pro Se Petitioner, Oscar L. Thomas ("Thomas" or Petitioner), a United States Army Honorably Retired and Disabled Veteran, respectfully prays that a Writ of Certiorari be granted to review the correctness of the decisions of the United States (US) District Court for the District of Columbia (DC District Court) for wrongfully "sau sponte" dismissing Petitioner's district court complaint alleging both constitutional and common law tort claims filed in DC district court against four (4) DC District Court and Magistrate Judges and other federal actors in their individual capacities.

The complaint (here not included) claimed that each judge and the other defendants acted without any ("subject-matter-jurisdiction"), ("all jurisdiction") and in a conspiracy to deny Petitioner his constitutional and civil rights.

On December 11, 2008, without any court proceedings being conducted, to include not holding a hearing or requiring any answer to the complaint by any defendant, the district court sau sponte dismissed the complaint and claims against all 4 of the judges named in the complaint for lack of subject-matter jurisdiction under Fed.R.Civ.P., Rule 12(h)(3), based on their "absolute immunity" for their "judicial acts" as to Plaintiff's/Petitioner's allegedly allegations that each acted or conspired to act without any ("subject-matter-jurisdiction"), ("all jurisdiction") to deny Plaintiff/Petitioner his civil rights by dismissing and/or granting summary judgment to a number of other federal defendants or officials in an underlying (02-cv-1743) complaint. Pet's App. at A-3 - A-4.

This current complaint also named other additional federal employee-defendants, officials and actors in the complaint in their individual capacities for constitutional and common law tort violations and of federal statues. The district court has also now dismissed the remaining defendants from the complaint based on their alleged claims of "qualified immunity" or other immunity under the Federal Tort Claims

Act (FTCA)'s "discretionary functions exception" and/or its provisions. The United States Court of Appeals for the District of Columbia Circuit (DC Circuit) has affirmed the district court's opinions in its Civil Action #'s 09-5349 and 5138, not here included.

A. Facts Giving Rise To This Case

This Petition arises from claims filed in a DC District Court Complaint, (Civil Action 07-cv-0598), growing out of claims filed in an original complaint previously filed in this same DC District Court, (Civil Action 02-cv-1743), (not here included) and (hereafter referred to as the "underlying complaint", or "underlying case"), alleging claims and allegations of wrongful or negligence acts or omissions by the Secretary, Department of Veterans Affair and 15 other federal employees filed in a district court complaint under the Federal Tort Claims Act, 28 U.S.C.§§ 1346(b), dated August 30, 2002, and which is directly related to Petitioner's Petition for Writ of Certiorari, Civil Action Number: 09-411, filed in this Court on October 6, 2009.

It, like the initial filing, presents a very unique set of unlikely, bizarre and unusual legal imparities, facts, unfortunate circumstances, and important questions of law, including veterans law questions, growing out of and relating to the above stated underlying case warranting grant of Writ of Certiorari to resolve. It alleges by Petitioner that the named judges acting in these cases conspired with each other and other federal government employees and officials and private actors in committing constitutional and common law torts and other statutory violations to deny Plaintiff/Petitioner his constitutional due process and equal protection and civil rights, by acting without constitutional or statutory authority, e.g., (by acting without subject-matter jurisdiction) with other named ("US Justice Department") federal officials/federal employees and private actors to injury

and deny, constituting their own conspiracy and violations of law as alleged against them in the complaint.[1]

Petitioner incorporates herein by reference Petitioner's Petition for Writ of Certiorari, Petition Number: 09-411, filed and docketed in this Honorable Court on October 6, 2009, and the complete and total underlying district and appellate court-case records files in cases numbers: District Court 02cv1743, 07cv0598, and Appellate Court case files Numbers: Civil Actions 5182 (January 14, 2005), 08-5943 and 09-5138, which

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[1]Specifically, the underlying case and claims therein involves the Secretary, VA who is the chief decider and final arbiter on all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors; who is also a defendant in two civil lawsuits, Civil Actions #'s (02-cv-1743) and (07-cv-0598), involving claims, allegations and questions against him and his agency employees and a single veteran involving inextricably intertwined veteran's benefit claims and non-benefit tort claims, where he has to consider and decide a benefit claim decision and questions as to when the veteran first received his prior "Statement of the Case (SOC) Decision" that will ultimately determine his ("veteran's benefit decision") as to if and when the veteran will receive certain veterans benefits; while at the same time, as to these questions, he has/is obartrarily and in his own self-interest, prejudicially, unfairly and without affording the veteran his statutory due process right in accordance with the Veterans Judicial Review Act (VJRA) and the Veterans Claims Assistance Act (VCAA), advocating, urging and arguing before the lower courts and now this Honorably United States Supreme Court that [it] should, in essence, answer this/these ("veteran's benefit question(s)") and render the decision for him and to him that he himself has yet to answer or make, but for which he alone is statutorily and lawfully is required/must/shall answer and make while affording the veteran his due process rights as mandated by the cited VA federal statues, the VJRA and VCAA. Questions on decisions that he has yet to answer/make, but which the lower courts have already directly or indirectly decided by their alleged illegal action and court decisions, which he is now directly relying on and will continue to rely on to deny the veteran's claims for veteran's benefits. Also, in this regard, the Secretary, VA also has a conflict of interest and owed duty to the veteran that the Secretary "shall" rendered his own independent decisions based on and in accordance with the cited VA Rules, Regulations and the Federal the Laws. Specifically, 38 U.S.C. § 511(a).

are all ripe and timely appealed to this Court under DC Circuit Appellate Court Decision 08-5943 and docketed under Writ 09-411.

Growing out of proceedings in the above referenced cases, the fulcrum of this controversy is that it involves Article III of the U.S. Constitution and the intersection of at least three federal statutes where it has been alleged that at least 4 federal district court and magistrate judges have acted and ruled on the merits of a number of complaints, (dismissing them), requiring appeals and injuring Petitioner, because, the district court acted without (subject-matter jurisdiction, indeed without ("all jurisdiction") in the first instance.

B. The District Court Proceedings

On March 28, 2007, for claims of injury and damages growing out of Petitioner's underlying case, (US District Court Civil Action 02-cv-1743), Petitioner filed a new action (07-cv-0598, for constitutional and common law tort claims against four (4) DC District Court Judges growing out of the same or similar acts or occurrences as alleged in the original underlying case, for their alleged illegally acting in the case, (Civil Action 02-cv-1743), specifically, for ("acting without subject-matter jurisdiction"), ("without all jurisdiction"), and for then acting in violation of federal statues, US Constitution and DC common law, (by conspiring with the Assistant United States US Attorney's defending in the case, with the Secretary, VA, a number of other federal employees and other private individuals to deprive Petitioner of his constitutional rights), e.g., (by committing various torts against Petitioner by acting and participating in the case where the Judges and Attorney's knew or should have known that the Court and the Judges had [n]o subject-matter jurisdiction, and [l]acked ("all jurisdiction") in the underlying case, violating and depriving Petitioner of his constitutional

and statutory due process and equal protection rights; and depriving Petitioner access to the courts.

On December 11, 2008, before any answer or responsive pleading was filed by any defendant named in this case, the presiding Honorable Judge, Richard J. Leon, hereafter ("RJL") issued a Memorandum Order, sau sponte dismissing the named defendant judges from the action under the Federal Rules of Civil Procedure, Rule 12(h)(3).[1] Plaintiff disagreed and on December 20, 2008, filed Motion for Reconsideration and to file a Third Motion to Amend the complaint, to include the naming of judge RJL as a defendant in the complaint. Pet's App. at A-5 - A-18. Judge RJL denied the Motion in its entirety, continued ruling, (even as to claims allege against him), and did not, as required, automatically recuse himself from the case. Whereas, because of his rulings, the case was then in essence, split by the dismissal of the judges. A timely a notice of appeal was taken to the DC Circuit Court of Appeals.

C. Appellate Court Proceedings

By Civil Action Case No. 09-5138, in an Unpublished Per Curiam Order dated August 19, 2009, the DC Circuit, citing *Taxpayers Watchdog, Inc. v. Stantley*, 819 F.2d 294, 297 (D.C. Circuit 1987)(per curiam), summarily affirmed the district court memorandum opinion and order of dismissal by ruling, citing *Marales v. Saco*, 502 U.S. 9 (1991), that (1) "the district court properly dismissed the action against the judges because they are absolutely immune from liability for damages for actions taken in the "course" of their official capacities, and (2) that there is (absolute immunity for Judges

[1] Rule 12(h)(3), Lack of Subject-Matter Jurisdiction, States:

> "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."

from damages for "acts" committed in their judicial capacities), prompting Petitioner's filing of this Petition for Writ of Certiorari. See Pet. App. at A-1 – A-3.

D. Argument

1. Judicial Immunity Does NOT Apply In This Case

Based upon the true factual proceedings and circumstances in this case, Appellate and Supreme Court Law Precedence governing "judicial immunity", see *Bradley v. Fisher*, 80 U.S. at 352, judicial immunity does not apply in this case because this Court has said:

> "The necessary inquiry in determining whether a defendant judge is immune from suit is whether, at the time he took the challenged action, he had jurisdiction over the subject matter before him." *Stump v. Sparkman*, 435 U.S. 349 (1978).
>
> "Where there is ***no jurisdiction, there is no immunity***. A judge must be acting within his jurisdiction as to subject matter and person, to be entitled to immunity from civil action for his acts. *Davis v. Burris*, 51 Ariz. 220, 75 P.2d 689 (1938)."
>
> Long ago in *Bradley*, this court said:
>
> "A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible."

"If a judge does not fully comply with the Constitution, then his orders are void and he is without jurisdiction, and engaged in acts of treason to the Constitution." See *U.S. v. Will,* 449 U.S. 200, 216, 101 S.Ct. 471, 66 L.Ed.2d 392, 406 (1980).

Therefore, as demonstrated by the district court docket proceedings and rulings, which are opposite of *Bradley*, shows that the trial judge(s) acted in the "clear absence of all jurisdiction" by hearing motions and issuing orders that affected the case and outcome, (the merits of the underlying case), since "jurisdiction over the subject-matter [*was not*] invested by law ... in the court which he [held]." *Bradley v. Fisher*, 80 U.S. at 352.

"When a judge acts intentionally and knowingly to deprive a person of his constitutional rights he exercises no discretion or individual judgment; he acts no longer as a judge, but as a "minister" of his own prejudices." *Pierson v. Ray*, 386 U.S. 547 at 568 (1967).

"When a judge knows that he lacks jurisdiction, or acts in the face of clearly valid statutes expressly depriving him of jurisdiction, judicial immunity is lost. *Rankin v. Howard,* (1980) 633 F.2d 844, cert den. *Zeller v. Rankin,* 101 S.Ct. 2020, 451 U.S. 939, 68 L.Ed 2d 326."

Here, the named judges lost their immunity by first acting without subject-matter jurisdiction, (without Article III constitutional and federal statutory authority), and by participating in a conspiracy to violate Plaintiff/Petitioner's civil rights through a nonjudicial or a judicial act - but in the clear and complete absence of subject-matter jurisdiction - as if they had that subject-matter jurisdiction. The district court also failed to consider, as alleged by the Petitioner in the amended complaint, the non-judicial character of the defendants' prior conduct in the underlying case. "(A)s the case (come) to" the Supreme Court, only a "judicial act" has been addressed by "(t) he courts below."

In federal tort law, judges cannot invoke judicial immunity for acts that violate litigants' civil rights. *Robert Craig Waters. Tort & Insurance Law Journal*, Spr. 1986 21 n3, p509-516. (Without question, the conduct alleged and described in the complaint clearly shows the defendants abridged and violated Plaintiff/Petitioner's civil rights, e.g., (specifically, Plaintiff/Petitioner was hindered in pursuing a cognizable claim or claims - by the judges granting dismissal and summary judgment [without] subject-matter jurisdiction over case, which is a crime); and thus, (specifically, Plaintiff/Petitioner "actually lost...[an] otherwise valid legal claim of claims, and was [unable] to raise such claims in [any] other proceedings, such as under the FTCA or other statues).

In its analysis, the district court simply attempts to describe Plaintiff/Petitioner's constitutional tort allegations and violations as only, ("in essence", is that [he] was denied access to the courts when the FTCA Litigation was dismissed"), is an erroneous and a willful mischaracterization of Plaintiff's/Petitioner's pleadings as call for under Rule 8(a) of the Fed.R.Civ.P.), and the liberal reading and construing of a *pro se* litigant's pleadings.

In *Harlow*, this Court said:

> "referring both to the objective and subjective elements, we have held that qualified immunity would be defeated if an official "knew or reasonably should have known that the [a]ction he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], *or* if he took the action with the malicious intention to cause a deprivation of constitutional rights [o]r other injury."" *Harlow et al v. Fitzgerald*, 457 U.S. 800; 102 S. Ct. 2727; 73 L. Ed. 2d 396; (1982).

Defendants' took the actions described in the complaint with the clear intentions of depriving [Plaintiff/Petitioner] of his constitutional rights or causing him other [common-law]

injuries as described in the complaint and thereafter in court proceedings since the initial filing.

"The purpose of the statute [42 U.S.C. § 1983] was to deter public officials from using the badge of their authority to violate persons' constitutional rights and to provide compensation and other relief to victims of constitutional deprivations when that deterrence failed." *Carey v Piphus*, 435 US 247, 253 (1978).

It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under protection of the law, independently and freely, without favor and without fear, [BUT] this provision of the law is not for the protection or benefit of a malicious or corrupt judge. *Pulliam v. Allen*, 466 U.S. 532, Fn. 7 (1984).

Judicial immunity is not found in the laws written by Congress, but in a self-serving "doctrine" enacted through "judicial legislation." Through this doctrine, the Defendant Judges in this case acted with impunity and believed that they had the absolute power to reject their oath; defy the law; ignore federal statutory legal requirements, and condone error, malicious conduct, corruption, deprivation of constitutional rights, conspiracy, and all manner of evil of themselves, and in turn, conspire with their colleagues simply because they proclaim themselves "immune"; and then conspired with Assistant United States Attorney's in defending them in the case, with the Secretary, VA, a number of other federal employees and other private individuals defendants, all named in the case in their individual capacities, believe that they are also immune based on their claim of 'absolute immunity" or "qualified immunity."

However, again, this Court has said:

> "Referring both to the objective and subjective elements, we have held that *qualified immunity* would be defeated if an official "knew or reasonably should have known that the action he took within his sphere of official

responsibility would violate the constitutional rights of the [plaintiff], *or* if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury." *Harlow et al v. Fitzgerald*, 457 U.S. 800; 102 S. Ct. 2727; 73 L. Ed. 2d 396; (1982)."

Therefore, because the named officials "knew or reasonably should have known that the actions they took within their sphere of official responsibility would violate the constitutional rights of the ["Plaintiff/Petitioner], they are, also for these and other reasons, not entitled to qualified immunity and are not immune. See *Saucier v. Katz*, 533 U.S. 194, 201 (2001), (such immunity is qualified, and government actors who violate clearly established constitutional rights [c]annot benefit from it).

2. The Law as it Pertains to Recusals

Also, at the time of the claimed injuries and prior to the filing of the (07-cv-0598) lawsuit, the Petitioner filed Judicial Misconduct Complaints against the named judges and requested their recusals, which were dismissed by the supervising DC Appellate Court on the grounds that the named judge were all performing [*judicial acts*] as to the conduct being alleged against them. However, in viewing the procedural records it appears that each of the named judges, except one did, at certain points during their presiding over the underlying case, did in fact, recuse themselves by the fact that the case was passed or transferred to 4 different judges over the course of the district court proceedings; and with a fifth overseeing this current related complaint, who also refused to recuse himself.

Canon 3 of the Code of Judicial Conduct (Supreme Judicial Court Rule 3:09) states that "a judge shall disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to

instances where he has a personal bias or prejudice concerning a party, and in 1994, this U.S. Supreme Court held that "disqualification is required if an objective observer would entertain reasonable questions about the judge's impartiality. If a judge's attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely, the judge must be disqualified." [Emphasis added]. *Liteky v. U.S.*, 114 S.Ct. 1147, 1162 (1994). The judges subsequent "attitudes and state of mind and rulings in these cases, ("acting without subject-matter jurisdiction on the merits" in direct contravention and violation of a federal statues stating the judges and the Court lacked subject-matter jurisdiction"), showed personal biases prompting or suggesting that an objective observer would entertain reasonable questions about the Judges' impartiality and disqualification was required, and that he or she knew or reasonably should have known that their actions would result in violations of Plaintiff's/Petitioner's constitutional rights and violate federal statues, specifically, 28 U.S.C. § 2679(d)(1) is one such statue.

Courts have repeatedly held that positive proof of the partiality of a judge is not a requirement, only the appearance of partiality. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S.Ct. 2194 (1988) (what matters is not the reality of bias or prejudice but its appearance); *United States v. Balistrieri*, 779 F.2d 1191 (7th Cir. 1985) (Section 455(a) "is directed against the appearance of partiality, whether or not the judge is actually biased.") ("Section 455(a) of the Judicial Code, 28 U.S.C. §455(a), is not intended to protect litigants from actual bias in their judge but rather to promote public confidence in the impartiality of the judicial process."). The Court's classification of Petitioner's claims of Judicial Misconduct as, in essence, a "dissatisfied" or "disgruntle litigant " was improper in view of the court's rulings in this case. Section 455(a), "requires a judge to recuse herself or himself in any proceeding in which [his] impartiality might

reasonably be questioned." *Taylor v. O'Grady*, 888 F.2d 1189 (7th Cir. 1989).

In *Pfizer Inc. v. Lord*, 456 F.2d 532 (8th Cir. 1972), the Court stated "it is important that the litigant not only actually receive justice, but that he believes that he has received justice."

The Supreme Court has ruled and has reaffirmed the principle that "justice must satisfy the appearance of justice", *Levine v. United States*, 362 U.S. 610, 80 S.Ct. 1038 (1960), citing *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13 (1954).

Therefore, "Recusal under Section 455 is self-executing; a party need not file affidavits in support of recusal and the judge is obligated to recuse [himself] *sua sponte* under the stated circumstances." *Taylor v. O'Grady*, 888 F.2d 1189 (7th Cir. 1989).

"Judges do not have discretion not to disqualify themselves. By law, they are bound to follow the law. Should a judge not disqualify herself or himself as required by law, then the judge has given another example of his "appearance of partiality" which further disqualifies the judge. None of the orders issued by any judge who has been disqualified by law would be valid. They are void as a matter of law, and are of no legal force or effect."

"Should a judge not disqualify her or himself, then the judge is in violation of the Due Process Clause of the U.S. Constitution." *United States v. Sciuto*, 521 F.2d 842, 845 (7th Cir. 1996) ("The right to a tribunal free from bias or prejudice is based on the Due Process Clause.").

"The Supreme Court has held that if a judge acts after he has been automatically disqualified by law, then he is acting without jurisdiction and engaged in acts of treason to the Constitution." *U.S. v. Will*, 449 U.S. 200, 216, 101 S.Ct. 471, 66 L.Ed.2d 392, 406 (1980).

The bottom line is that the named judges were legally required to recuse themselves from the two cases involving

Petitioner at the instant each were notified of Petitioner's complaint of judicial misconduct against them; and most certainly when the Petitioner specifically requested the presiding judge in the second case (07-cv-0598) to recuse himself and/or allow Petitioner to file an Amended Complaint naming Judge RJL, the then presiding judge, as a defendant in the case in which he was presiding, and in which he denied the motion. Instead, the judge has refused to recuse himself where he was legally required to do so, he denied the motion to file the amended complaint naming him as another defendant in the case, and he has continued to issue and rendered bias and non-impartial decisions and rulings in the case in favor of his colleague judges, other defendants and himself to which he and others have alleged to have conspired to violate Petitioner's constitutional rights and federal statues.

REASONS WHY CERTIORARI SHOULD BE GRANTED:

May It Please The Court:

I. Review is warranted because:

A. The named judges were not immune from civil damages in this case, because they never acquired Article III Federal Statutory "Subject-Matter Jurisdiction" over Petitioner's underlying FTCA case under provisions of the FTCA's and its framework; rendering [a]ll of the district court's rulings, decisions and opinions below, (growing out of the underlying FTCA case at hand), improper, as not taken in accordance with District of Columbia, Federal law and Supreme Court Precedence, to the contrary, null and void. For this single and very important reason alone, the Petition for Writ of Certiorari should be granted.

B. Review is warranted because, in granting motion to dismiss and for summary judgment in the underlying case,

and therefore, in this case[3], the lower court had departed from the accepted standard of review set by this Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 68 USLW 4480, (U.S., Jun 12, 2000); (argued in Writ to this Court, 09-411).

C. Review is warranted because the D.C. Circuit Court also lacked Appellate jurisdiction to review and rule on the merits of this and the underlying case, and improperly sanctioned the district court's dismissals and summary affirmance orders on *Taxpayers watchdog Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam) as to "the merits of the parties positions", and on *Morales v. Waco*, 52 U.S. 9 (1991) for the proposition that "the district court properly dismissed the action against the judges, (describing the conduct alleged against them as *actions* taken in the course of their official capacities), claiming (absolute immunity for judges from damages for acts committed in their judicial capacities).

However, here, judicial immunity nor qualified immunity applied because, where there is ***no jurisdiction, there is no immunity***. A judge must be acting within his jurisdiction as to ***subject matter*** and person, to be entitled to immunity from civil action for his acts. *Davis v. Burris*, 51 Ariz. 220, 75 P.2d 689 (1938).

[If] a judge does not fully comply with the Constitution, then his orders are void and he is without jurisdiction, and engaged in acts of treason to the Constitution. *U.S. v. Will*, 449 U.S. 200, 216, 101 S.Ct. 471, 66 L.Ed.2d 392, 406 (1980).

D. Review is warranted because the *Per Curiam* Summary Action Order issued by the 3-Judge Panel of the DC Circuit (Sentelle, Chief Judge, and Ginsburg and Garland, Circuit Judges), conflicts with all discernable opinions of all other Circuit Courts, as well as its own discernable opinions

[3] The district court also erroneously ruled that the complaint failed to allege or state *any* actionable claims; ("he failed to allege any constitutional violation"). Pet's App. at A-19 at Pages 1 and 3.

that have ever addressed this same important matter or question(s), which is "whether, in the underlying case, and therefore in this case, did the district court have Article III Federal Statutory "Subject-mater Jurisdiction" Authority to hear/review and/or to adjudicate the underlying Case under the FTCA framework"; that also allegedly constituted protrusion and unauthorized reviewed of an inextricable intertwined veteran's benefit claim decision and FTCA claims when the controlling Supreme Law says that ("The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans"), and then therefore, it exercised subject-matter jurisdiction and authority to rule that the judges and other defendants in this and the underlying inextricable intertwined case were all entitled to absolute or qualified immunity as to their conduct in the claims alleged against them growing out of civil actions (02-v-1743) which manifested in, and grew out of civil action (07-cv-0598).

E. The district court's rulings, and the DC Circuit's affirmation of those rulings, if allowed to stand and become precedence, (Civil Actions 09-4359 and 09-5138), although "per carium" in nature, will have and give a very extreme, chilling and damaging effects on every veteran's soldier's rights who may need and have to apply for veteran's disability benefits from the VA, and will constitute and sanction court-intervention, protrusion, intrusion and unauthorized reviewed of inextricable intertwined veteran's benefit claims decisions and FTCA claims at the request of the Secretary himself when it is he, "The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans." However here, the courts have made those decision(s) for him, which was improper.

And, as to "judicial immunity", "unconferred", it would allow the judges to abrogate the principles laid down in *Bradley*, that "when a judge knows that he lacks jurisdiction, or acts in the face of clearly valid statutes or case law expressly depriving him of jurisdiction, judicial immunity is lost. See *Bradley v. Fisher*, 80 U.S. (13 Wall.) at 351 ("when the want of jurisdiction is known to the judge, [n]o excuse is permissible"); *Turner v. Raynes*, 611 F.2d 92, 95 (5th Cir. 1980) (*Stump* is consistent with the view that "a clearly inordinate exercise of unconferred jurisdiction by a judge-one so crass as to establish that he embarked on it either knowingly or recklessly-subjects him to personal liability").

II. Jurisdiction and Legal Standard

Whether a public official is entitled to absolute immunity is a question of law that is reviewed de novo." *Goldstein v. City of Long Beach*, 481 F.3d 1170, 1172 (9th Cir. 2007).

It has long been established that judges are absolutely immune from liability for acts "done by them in the exercise of their judicial functions." *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1871). The Supreme Court has extended such absolute immunity to other public officials who perform activities that are "functionally comparable" to those of judges. *Butz v. Economou*, 438 U.S. 478, 513 (1978); *see also Sellars v. Procunier*, 641 F.2d 1295, 1303 (9th Cir. 1981) ("If an official's role is functionally equivalent to that of a judge, the official will be granted equivalent immunity."). Such activities are sometimes referred to as "quasi-judicial." *See, e.g., Imbler v. Pachtman*, 424 U.S. 409, 420 (1976). "Absolute immunity flows not from rank or title . . . but from the nature of the responsibilities of the individual official." *Cleavinger v. Saxner*, 474 U.S. 193, 201 (1985).

The Court has outlined a list of factors to consider in determining whether an official's functions are quasi-judicial in nature: (1) the need to insulate the official from harassment

or intimidation; (2) the presence of procedural safeguards to reduce unconstitutional conduct; (3) insulation from political influence; (4) the importance of precedent in the official's decision; (5) the adversary nature of the process; and (6) the correctability of error on appeal. *Id.* at 202 (citing *Butz*, 438 U.S. at 512). This list of factors is nonexhaustive, however, and an official need not satisfy every factor to be entitled to absolute quasi-judicial immunity. *See Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 923 (9th Cir. 2004) (noting that the *Butz* factors are "nonexclusive").

However, the absolute immunity normally accorded officials performing quasi-judicial functions does not extend to "actions, though judicial in nature, taken in the complete absence of all jurisdiction." *Marales v. Waco*, 502 U.S. 9, 12 (1991). Where the official acts merely in excess of his authority, however, he will not be deprived of immunity; "rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.' " *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978) (quoting *Bradley*, 80 U.S. (13 Wall.) at 351). "Jurisdiction should be broadly construed to effectuate the policies supporting immunity." *Ashelman v. Pope*, 793 F.2d 1072, 1076 (9th Cir. 1986) (en banc); *see also Stump*, 435 U.S. at 356 ("Because 'some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction . . . ,' the scope of the judge's jurisdiction must be construed broadly . . . ." (quoting *Bradley*, 80 U.S. (13 Wall.) at 352)) (citation omitted).

"In determining judicial immunity, we have distinguished between acts "in excess of jurisdiction" and acts "in the clear absence of jurisdiction" by looking to the subject matter jurisdiction of the judge: "[a] clear absence of all jurisdiction means a clear lack of all subject matter jurisdiction." *Mullis v. U.S. Bankr. Court, Dist. of Nev.*, 828 F.2d 1385, 1389 (9th Cir. 1987).

The necessary inquiry in determining whether a defendant judge is immune from suit is whether, at the time he took the challenged action, he had jurisdiction *over* the subject matter before him.

In this case, the named judges and other named federal employees and officials acted in [a] clear absence of all jurisdiction, [a] clear lack of "all subject-matter jurisdiction".

The doctrine of absolute judicial immunity for judges and qualified immunity for other federal official performing quasi-functions *does not* extend to "actions, though judicial in nature, taken in the complete absence of all jurisdiction." *Marales v. Waco*, 502 U.S. 9, 12 (1991).

A. Motion to Dismiss for Lack of Jurisdiction

Subject-matter jurisdiction may be raised at any stage of proceedings, to including on appeal.

Federal courts are courts of limited jurisdiction and the law presumes that "a cause lies outside this limited jurisdiction."[4] *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511

[4] The Federal Tort Claims Act (FTCA), ch. 753, § 401, 60 Stat. 842, confers jurisdiction on the district courts to hear tort suits arising out of the "negligent or wrongful act or omission of any employee of the Government "while acting *within* the scope of his office or employment", under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1) (Supp. III 1997). The FTCA makes the United States liable in tort "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C.2674. In turn the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563, commonly known as the *Westfall Act*, provides individual government employees with an immunity from personal liability by substituting the United States for them as the defendant if the Attorney General or her delegate certifies that the employees were acting within the scope of their employment. 28 U.S.C. §§ 2679(b) and (d); see generally *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 425-426 (1995). [O]nce the United States has been substituted as the defendant, the case proceeds as an action under the

U.S. 375, 377 (1994). Because subject matter jurisdiction is an Article III as well as a statutory requirement, "no action of the parties can confer subject[]matter jurisdiction upon a federal court.'" *Akinseye v. District of Columbia*, 339 F.3d 970, 971 (D.C. Cir. 2003).

On a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) or by the court sau sponte under 12(h)(3), the plaintiff bears the burden of establishing that the court has subject matter jurisdiction. *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999); *see also McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 182-83 (1936).

Because subject matter jurisdiction focuses on the court's power to hear the claim, however, the court must give the plaintiff's factual allegations closer scrutiny when resolving a Rule 12(b)(1) or Rule 12(h)(3) motion than would be required for a Rule 12(b)(6) motion for failure to state a claim. *Macharia v. United States*, 334 F.3d 61, 64, 69 (D.C. Cir. 2003). Moreover, the court is not limited to the allegations contained in the complaint. *Hohri v. United States*, 782 F.2d 227, 241 (D.C. Cir. 1986), *vacated on other grounds*, 482 U.S. 64 (1987). Instead, to determine whether it has jurisdiction over the claim, the court may consider materials outside the pleadings. *Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 197 (D.C. Cir. 1992).

Here, the legal standard applied was simply inapplicable. First, because the claims alleged in the complaint are all claims that grew out of and underlying related FTCA complaint, where plaintiff had alleged that the court in the underlying case has allegedly acted and ruled on the merits of that complaint without ever possessing subject matter jurisdiction, because the U.S. Attorney General failed to issue *Westfall Act Certifications* in the underlying complaint

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FTCA. 28 U.S.C. 2679(d)(4).

certifying "scope of office or employment" as to each employee-defendant, the district court never acquired the required Article III constitutional and/or statutory subject-matter authority, and by acting and ruling on the merits without "subject-matter jurisdiction, without "all jurisdiction" in the first instance in the underlying case, and committed constitutional and common law torts causing Plaintiff/Petitioner injury, for which the judges and the other named defendants are not immune. Second, the United States was never substituted as party defendant in the underlying case, and thus the district court's subject-matter jurisdiction was never invoked as required pursuant to (28 U.S.C. § 2679(d)(1), depriving the district court of "all federal subject-matter jurisdiction" and from ever reaching the merits of the case and claims under the FTCA framework, and further deprives all named federal employee-defendants' of even *Westfall Act* immunity, subjecting them to personal liability.

The district court's memorandum of dismissal of Petitioner's Second Amended Complaint and analysis of the claims therein that grew out of the underlying (02-v-1743) complaint, that is based on grounds that (1) the judge were dismissed from the case on the grounds that they had absolute immunity for their judicial acts committed within their jurisdiction, and (2) Thomas's constitutional tort claims must be dismissed because the remaining defendants are also immune from them, based on their qualified immunity; and (3) that in its discretion to determine whether a constitutional violation occurred, and if so, whether the right was clearly established, was clearly erroneous and not in accordance with governing law for the reasons alleged above, herein and elsewhere, and the DC Circuit Court Summary Affirmance Action Orders or likewise erroneous and not in accordance with the cited governing law.

For the reasons already stated the DC Circuit's Summary Affirmance of those opinions, both conflicts with the cited

legal standard and legal authorities cited by Defendants/ Respondents in Paragraph II A. *Kokkonen v. Guardian_Life. Co. of Am.,* 511 U.S. 375, 377 (1994), (Federal Courts are courts of limited jurisdiction and the law presumes that "a cause lies outside this limited jurisdiction."). *Akinseye v. District of Columbia*, 339 F.3d 970, 971 (D.C. Cir. 2003), (because subject-matter jurisdiction is an Article III as well as a statutory requirement, "no action of the [p]arties can confer subject[]matter jurisdiction upon a federal court."). Here, it was only pursuant to a provision of the *Westfall Act*, Federal Statute 28 U.S.C. § 2679(d)(1), that the district Court's subject-matter jurisdiction [m]ay be invoked under the FTCA). Since subject matter jurisdiction was never invoked by U.S. Attorney General's Scope of Office or Employment Certifications in the underlying case. (28 U.S.C. § 2679(d)(1). The district court never acquired subject-matter jurisdiction, and because the judges acted [without] subject-matter jurisdiction in the underlying case, they lost their immunity and are not immune from damages in this case.

This being the case, the district court's initial memorandum opinions of March 20, 2008 granting dismissal and summary judgment in the underlying case in the first instance, its subsequent memorandums of December 11, 2008, sau sponte dismissing the named judges, and the DC Circuit's affirmance of both of those opinions, in accordance with the governing laws of this Supreme Court and the land, are all null and void and their opinions should be reversed. And, because "Judicial immunity" does not apply to the named judges because, where there is [*no jurisdiction*], [*there is no immunity*]. *Bradley v. Fisher*, 80 U.S. at 352; *Marales v. Waco*, 502 U.S. 9, 12 (1991), and therefore, the district court exercises subject-matter jurisdiction over Plaintiff's/Petitioner's "new" case, Civil Action Complaint Number: (07-cv-0598) and all claims alleged therein.

B. Failure to Allege a Constitutional Violation

Review of a district court's grant of a motion to dismiss is de novo. Dismissal for failure to state a claim is appropriate *only* when it clearly appears that the plaintiff can prove no set of facts to support the claim which would entitle him or her to relief. See *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).• Such a motion tests the legal sufficiency of a claim accepting the veracity of the claimant's allegations. *Pro se* pleading are reviewed under a liberal standard, and all well pled factual allegations are accepted as true.

The district court's attempt to simply described Plaintiff/Petitioner's constitutional tort allegations and violations in the 58-page Amended Complaint as only, ("in essence", is that [he] was denied access to the courts when the FTCA Litigation was dismissed"), is an erroneous analysis and a willful mischaracterization of Plaintiff's/Petitioner's pleadings as call for under Rule 8(a) of the Fed.R.Civ.P.), and the liberal reading and construing of a *pro se* litigant's pleadings. The allegation and proof of that a judge or tribunal acted without "subject matter jurisdiction" is, in itself, a constitutional violation and a crime. ([If] a judge does not fully comply with the Constitution, then his orders are void and he is without jurisdiction, and engaged in acts of treason to the Constitution). *U.S. v. Will*, 449 U.S. 200, 216, 101 S.Ct. 471, 66 L.Ed.2d 392, 406 (1980).

Conclusion

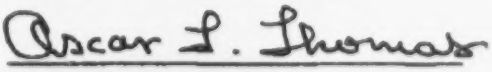
• Plaintiff Complaint clearly made reference to 42 U.S.C. § 1983, *does* allege constitutional violations and common law torts in a context sufficient to support original subject matter jurisdiction, and meets the requirement set forth in Fed. R. Civ. P. Rule 8(a) that pleadings contain a "short and plain statement" of the cause of action is to give notice to the defendant of the nature of the plaintiff's claim, and the grounds upon which it rests. Fed. R. Civ. P. Rule 8(a).

For the cited important national interest reasons, the needs to guard and preserve all citizens of veterans' constitutional and statutory protected rights and benefits, resolved important questions of federal law, which is inextricably intertwined and have not been, but should be settled by this Court the petition for writ of certiorari should be granted.

The judgment of the district court dismissing all claims against the named Judges and other named official and the DC Appellate Court's affirmance of same base on absolute immunity, and the other named defendants based on qualified immunity, and (because the complaint clearly states constitutional and common law tort claims), should be reversed and remanded for further proceedings consistent with this Court's reversal opinion.

It is further requested that this Court direct the award to Petitioner of all of his costs and expenses in filing all district court complaints and claims, Appeals Court Actions and Writ(s) of Certiorari with this Court in this matter.

Respectfully Submitted,



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Supreme Court, U.S.
FILED

09-832 NOV 12 2009

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

Oscar L. Thomas, Pro Se

Petitioner,

v.

R. James Nicholson, Secretary, United States Department of Veterans Affairs, in his Individual Capacity, et al

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals for the District of Columbia Circuit

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APPENDIX A TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A - TO WRIT OF CERTIORARI

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5138 September Term 2008
1:07-cv-00598-RJL
Filed On: August 19, 2009

Oscar L. Thomas,
Appellant

v.

R. James Nicholson, Secretary, Department of Veterans Affairs, in his individual capacity, et al.,

Appellees

BEFORE: Sentelle, Chief Judge, and Ginsburg and Garland, Circuit Judges

ORDER

Upon consideration of the motions for appointment of counsel; the motion to expedite, for summary reversal and remand with instructions, the opposition thereto, and the reply; and the motion for summary affirmance and the response thereto, it is

ORDERED that the motions for appointment of counsel be denied. With the exception of defendants appealing or defending in criminal cases, appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits. It is

FURTHER ORDERED that the motion for remand be denied. It is

FURTHER ORDERED that the motion for summary affirmance be granted and the motion for summary reversal be denied. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court properly dismissed the action against the judges because they are absolutely immune from liability for damages for actions taken in the course of their official capacities. See Mirales v. Waco, 502 U.S. 9 (1991) (absolute immunity for judges from damages for acts committed in their judicial capacities). It is

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5138 September Term 2008

FURTHER ORDERED that the motion to expedite be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
333 Constitution Avenue, NW
Washington, DC 20001

Oscar L. Thomas	)	
	)	
- Plaintiff,	)	
	)	
v.	)	Civil Action # 02-0598 (RJL)
	)	
R. James Nicholson et al	)	
	)	
- Defendants.	)	
	)	

MEMORANDUM ORDER
December 11, 2008

Plaintiff Oscar L, Thomas, pro se, filed a second amended complaint on December 6, 2008. Included in that complaint are claims under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against Judge Ellen S. Huvelle and Rosemary M. Collyer and Magistrate Judges Deborah A. Robinson and Alan Kay, all of whom sit on this Court. For the reasons below, the Court DISMISSES the complaint against the above-named defendant judges for lack of subject matter jurisdiction. Fed.R.Civ. 12(h)(3) ("if the court determines at any time it lacks subject-matter jurisdiction, the court must dismiss the action.").

Judges are absolutely immune from damage suits for the performance of judicial acts. *Forrester v. White*, 484 U.S. 219, 227 (1988). A judge clearly acts within the scope of his immunity when she "resolve[s] disputes between the parties who have invoked the jurisdiction of a court[.] *Forrester v.*

White, 484 U.S. 227. While a judge is no longer immune from suit if she acts "in the clear absence of all jurisdiction," *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978), such is not the case here. All the conduct complained of by plaintiff stems from a lawsuit he filed under the Federal Tort Claims Act. The district court clearly had jurisdiction over this federal question, 28 U.S.C. § 1331, and the judges' various decisions in that lawsuit fell within the definition of judicial acts. Plaintiff's remedy for his dissatisfaction with the judges' ruling lies with the appeals process, not the lawsuit now before this Court.[9]

Therefore, it is hereby

ORDERED that the amended complaint is dismissed with respect to the defendants Huvelle, Collyer, Robinson, and Kay.

SO ORDERED.

/s/
RICHARD J. LEON
United States District Judge

[9] Plaintiff requests remedies other than damages, such as injunctions and declaratory judgments. However, under *Bivens*, "its is damages or nothing." Davis v. Passman, 442 U.S. 228, 245 (1979) (citations and internal quotation marks omitted). Plaintiff requests for equitable relief therefore do not prevent this Court from dismissing the complaint for lack of subject matter jurisdiction.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
333 Constitution Avenue, NW
Washington, DC 20001

Oscar L. Thomas	)	
	)	
- Plaintiff,	)	
	)	
v.	)	Civil Action # 02-0598 (RJL)
	)	(ECF)
R. James Nicholson, Secretary,	)	
DVA, et al	)	
	)	
- Defendants	)	
	)	

MOTION FOR RECONSIDERATION OF COURT'S MEMORANDUM ORDER OF DISMISSAL, TO REVERSE, VACATE AND RESTORE DEFENDANTS TO COMPLAINT, OR IN THE ALTERNATIVE FOR LEAVE OF THE COURT TO FILE THIRD AMENDED COMPLAINT NAMING JUDGE RICHARD J. LEON (RJL) AS A DEFENDANT AND TO REASSIGN CASE, OR IN THE ALTERNATIVE TO CERTIFY AND JOIN

COME NOW the Pro Se Plaintiff, Oscar L. Thomas, herein by motion, respectfully, pursuant to the Federal Rules of Civil Procedure, requesting the Court to grant Plaintiff "[a] Motion pursuant to Fed. R. Civ. P. 59(e) to Alter or Amend Judgment and for Reconsideration of the Court's Memorandum Order, dated December 11, 2008, [Dkt. # 38], of dismissal, dismissing Plaintiff's complaint against defendant District Court Judges, Ellen S. Huvelle and Rosemary M. Collyer, and Magistrate Judges Deborah A. Robinson and Alan Kay and from this complaint based on a lack of subject matter jurisdiction pursuant to Fed. R. Civ. P., Rule 12(h)(3) ("if the

court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss he action'). See Court's Memo. Order at 1. In support of this motion Plaintiff submit the below Memorandum of Points and Authorities. Attempts to contact and obtain defendants position on this motion were unsuccessful.

MEMORAANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR RECONDISERATION OF COURT'S MEMORANDUM ORDER OF DISMISSAL, TO REVERSE, VACATE AND RESTORE DEFENDANTS TO COMPLAINT, OR IN THE ALTERNATIVE FOR LEAVE OF THE COURT TO FILE THIRD AMENDED COMPLAINT NAMING JUDGE RICHARD J. LEON (RJL) AS A DEFENDANT AND TO REASSIGN CASE, OR IN THE ALTERNATIVE TO CERTIFY AND JOIN

I. BACKGOUND

Plaintiff Oscar Thomas is a retired Army veteran has rightfully and routinely sought veteran's benefits from the Department of Veterans Affairs ("VA") for physical and mental health conditions that he believes and the Department has found are connected to Plaintiff's 25 years of military and war-time service.

In this case, Plaintiff, Pro Se has brought and stewarded his own case, and as a last resort and after administrative efforts failed, initially sues Mr. Principi, the Secretary, DVA at that time. Plaintiff restates and alleges that this Court, as it has previously done in this case, has once again, erroneously dismissed Plaintiff's claims and complaint due to its obvious erroneous findings, clear errors, and of a lack of subject-matter or authority under the FTCA framework, which it has never had from the outset. On its false and unauthorized acts of authority, this Court, for the past 6 years has, unmercifully and without any fairness, authority or regard for Plaintiff's constitutionally guaranteed protected legal and due process rights, or any sense of fairness, has continually denied Plaintiff this fairness and due process of law, and without any jurisdictional authority, has for these 6 full years, continuously kicked Plaintiff case down the road of injustice for this whole unjustifiable 6 years. In a separate action (07cv0598), Plaintiff

has file an original, first and second amended complaint District Court Judges and a number of other defendants in their individual capacity on claims alleged in the referenced complaints.

On December 11, 2008, before any answer or responsive pleading was file by any defendant in this case, the presiding Honorable Judge, Richard J. Leon, hereafter ("RJL") issued Memorandum Order, dismissing the named defendant judges from the action. Plaintiff disagrees and objects to the Court's Memorandum Order.

CONTENTIONS

Plaintiff's requests the Court reconsider and reverse its Memorandum Order of Dismissal, dismissing named Judges because: (1) the Court's findings of fact and application of law concerning the judges' judicial acts verses their acting absent of "all jurisdiction", to include, jurisdiction over the subject-matter, which are completely and totally erroneous and not taken in accordance with law and Supreme Court Precedence, (2) because the Court's Dismissal Order constitutes bias, partiality, frustration of effort, denial and access to justice and the courts, and is a denial of Constitutional Due Process, (3) because Plaintiff alleged, pointed to and present to the Court on the face of the Amended Complaint, claimed allegations, which the Court totally disregarded, which clearly establishes the Court's lack of "all jurisdiction" in the subject FTCA claim over which it contend and rule that the judges' actions were all "judicial acts", (4) because reconsideration is "need to correct clear error and manifest injustice", and (5) because, although Plaintiff acted to avoid the current outcome before a final order of dismissal had been entered, the Court, nonetheless issued it order sau sponte with disregard and without consideration of the key facts and the application of the applicable law to those facts; before any defendant had ever

filed answer or responsible pleading to the complaint claiming any claim or defense to the action.

Extreme caution should be exercised in ordering *sua sponte* dismissal of a *pro se* complaint before the adverse party has been served and the parties have had an opportunity to respond, *Anderson v. Coughlin*, 700 F.2d 37, 41 (2d Cir. 1983). "[J]udges enjoy ***absolute immunity*** from personal liability for 'acts committed within their judicial jurisdiction.'" *Young v. Selsky*, 41 F.3d 47, 51 (2d Cir. 1994) (emphasis added) (quoting *Pierson v. Ray*, 386 U.S. 547 (1967)).

ARGUMENT

For these reasons and the arguments presented below, Plaintiff believes the Court's statement of the facts, legal findings and Memorandum Order of Dismissal of December 11, 2008, relating to the Court's findings that it lack "subject-matter jurisdiction" over Plaintiff's claims against these "sitting judges", denies Plaintiff Due Process and access to justice and to the court, is simply "dead wrong". 28 U.S.C. § 1331.

In this present case once one has observed the true facts and looked into the authorities, it is clear, from them, as well as from the principle on which any immunity and lack of subject matter jurisdiction is claimed or maintained, that the Court has erred, because the qualifying words used ("judicial acts") were not necessary to a correct statement of the law, and that judges of courts of "limited jurisdiction" are indeed, liable to civil actions for their claimed alleged "judicial acts", specifically, when in fact, they have acted without all jurisdictional subject matter authority, because, all such acts are/were in excess of any and "all" jurisdiction they are attempting to claim they acted under....there is "the clear absence of all jurisdiction - over the subject matter." Where there is clearly no jurisdiction over, (U.S. Supreme Court Bradley v. Fisher, 80 U.S. 13 Wall. 335 (1871), (Page 80 U. S.

352), [the subject matter and authority exercised is a usurped authority], [and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible]. But where jurisdiction over the subject matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend. Thus, if a probate court, invested only with authority over wills and the settlement of estates of deceased persons, (specific subject-matter), should proceed to try parties for public offenses, jurisdiction over the subject of offenses being entirely wanting in the court, and this being necessarily known to its judge, (as here, "its judges"), his commission would afford no protection to him in the exercise of the usurped authority. But, if on the other hand a judge of a criminal court, invested with general criminal jurisdiction over offenses committed within a certain district, should hold a particular act to be a public offense, which is not by the law made an offense, and proceed to the arrest and trial of a party charged with such act, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction, no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him, for these are particulars for his judicial consideration, whenever his general jurisdiction over the subject matter is invoked.

However, here, this is not the case. District Courts are not courts of "general jurisdiction", but courts of limited jurisdiction. In this Supreme Court case, the Court went on to find that, "Indeed some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction, or that of the court held by him, or the manner in which the jurisdiction shall be

of this immunity when she resolve[s] disputes between the parties who have [invoked] the jurisdiction of the court[.] Since, in this case, no party [invoked] the subject-matter jurisdiction of this Court as required by a Federal Statue, [28 U.S.C. § 2679(b)-et seq.] in the referenced case, [this Cour[t], ha[d] no jurisdictional authority "at all" to ac[t]. Thus, the judges must answer to Plaintiff's complaint. The underlying factual allegations described conduct on the face of the complaint outside the scope of the named Judges' office, employment and jurisdictional authority.

The judges' and the Court's persistence in making rulings and orders against Plaintiff in this case, without "all jurisdiction", is a willful and known frustration and a continued frustration of Plaintiff's efforts on their part of Plaintiff's absolute legal and constitutional rights to access to justice and the court[s], as alleged herein and in the captioned original and amended complaints, which has caused and continues to cause grave injury and prejudice to the Plaintiff, and it renders the defendants and the defendant Judges liable to answer in damages for their acts at the uit of the plaintiff.....(where there is clearly no jurisdiction over, ["*the subject matter*"], (U.S. Supreme Court Bradley v. Fisher, 80 U.S. 13 Wall. 335 (1871), (Page 80 U. S. 352), any authority exercised [is a usurped authority], and for the exercise of such authority, when the want of jurisdiction is known to the judge or judges, no excuse is permissible)(no immunity is available).

Here, clearly, when the want of jurisdiction wa[s] known to the judges to be lacking, (which Plaintiff pointed out to them constantly), which they all knew was and is still lacking for their acts and omissions, they all each exercised a usurped authority and so, [any authority exercised by any one and/or all of them, is/was a usurped authority], [and for their exercise of such authority, when the want of jurisdiction is/was known to them, [the judge or judges], no excuse is permissible], e.g., (he, she, they are no[t] immune). (A judge is no longer immune from suit if she acts "in the clear absence of all jurisdiction,"

Stump v. Sparkman, 435 U.S. 349, 356-57 (1988). The Court thus had Article III subject matter jurisdiction to consider plaintiff's claims against the judges because they do meet the "bedrock" constitutional requirement that they present a justiciable "case or controversy" for this Court's decision. 28 U.S.C. § 1331.

While it is both logical and practicable for the Court to determine whether the plaintiff has stated claims justiciable under Article III of the Constitution before addressing, or requiring the defendants to address, the merits of those claims, however, immunity is a defense that must be claimed and not sau sponte granted or awarded to defendants by the Court sau sponte and/or on a motion for extension of time to file initial response to the action.

The Court and the Judges' contentions that, "All the conduct complained of by Plaintiff stems from a lawsuit he filed under the FTCA", that "the district court clearly had jurisdiction over this federal question, 28 U.S.C. § 1331", and "the judges' various decisions in that lawsuit fell within the definition of judicial acts", and that, "Plaintiff's remedy for his dissatisfaction with the judges' rulings lies with the appeals process[2], not the lawsuit before this court". This is a

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[2]However, here, on the primary underlying issue/question, that the Honorable RJL is attempting to re-answer sau sponte in his dismissal Order, e.g., whether, "All the conduct complained of by Plaintiff stems from a lawsuit he filed under the FTCA", "the district court clearly had jurisdiction over this federal question, 28 U.S.C. § 1331, and the judges' various decisions in that lawsuit fell within the definition of judicial acts", and that, "Plaintiff's remedy for his dissatisfaction with the judges' rulings lies with the appeals process, not the lawsuit before this court", showing that "the district court clearly had *no* subject-matter jurisdiction over this federal question under 28 U.S.C. § 1331", and "the judges' various decisions in that lawsuit fell within the definition of judicial acts", has already been asked and is currently before Appellate Court. See appeal of Plaintiff in DC Civil Action # 02cv1743, DC Appellate Court # 08-5349. This Court exercised a usurped authority in attempting to decide this issue that is for and now before that DC Appellate Court.

continuous injury and prejudice to Plaintiff by the judges' in their denial of justice and Plaintiff's constitutional guaranteed protected right of access to the court(s), and is a lack of and absence of any showing on the defendants' judges part that "the district court clearly had jurisdiction over this "federal question", 28 U.S.C. § 1331"[3], and "the judges' various decisions issued in that lawsuit (02cv1743) fell within the definition of judicial acts", which are all based on [a usurped authority]; because, no statutory jurisdiction of an Article III case attached at the outset of a case, and subsequent events do not destroy it because it never existed.[4] The court may dismiss a complaint for lack of subject-matter jurisdiction *only* if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Empagran S.A. v. F. Hoffman-Laroche, Ltd.*, 315 F.3d 338, 343 (D.C. Cir. 2003) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Because the Judges were not performing "judicial acts" within Art. III's subject-matter jurisdictional authority and are not immune from the plaintiff's claims, the court ***exercises subject matter jurisdiction*** over Plaintiff's (07cv0598) captioned complaint and claims against them.

Each of the named Judges have exercised a usurped authority, based on the *Bivens* complaint allegations of the

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[3] Because, in this case, what gives the Art. III Court and the Judges their subject-matter jurisdictional authority is not 28 U.S.C. § 1331, but the U.S. Attorneys scope of employment certifications required by 28 U.S.C. § 2679(b)-et seq. Absent this § 2679(b) "subject-matter jurisdictional authority", the Court exercised a usurped authority.

[4] Thus, as the Court of Appeals has recognized, "resolving a merits issue while subject-matter is in doubt 'carries the court beyond the bounds of authorized judicial action' . . . and violates the principle that 'the first and fundamental question is that of jurisdiction. In re Minister Papandreou, 139 F.3d 247, 254-55 (D.C. Cir. 1998) (citations omitted); accord Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583 (1999) ("Article III generally requires a federal court to satisfy itself of its jurisdiction over the subject matter before it considers the merits of the case. . . ").

Judges prohibited rulings relating to VA benefit claims and subsequent rulings on "Plaintiff's failure to exhaust administrative remedies in the underlying the Federal Tort Claims Act ("FTCA") Claim, 28 U.S.C. §§ 1346(b), 2671 *et seq.*,[5] framework in that case and on request for reconsideration, which this Court cited as "jurisdictional", and after having this Civil Action (02cv1743) pending before it from August 30, 2002 to 2008, or 6 years], which Plaintiff believe is [an obstruction of justice]; and further, a denial of reconsideration of the Opinion granting Defendant(s) summary judgment on the claims surrounding the failure of Memphis VAMC to provide medical attention to Plaintiff in November 2002, based on (1) the Court's findings of fact concerning when Plaintiff's October 2001, 2002 and 2003 claims accrued, which were clearly erroneous; (2) the Court's factual and legal findings relating to Due Process and here [access to justice and the Courts], procedural history, analysis, conclusions and application of law, (3) to point and present to the Court, raised arguments and/or to present evidence that was raised prior to the entry of judgment, but not considered, (4) the "need to correct clear error and manifest injustice", and (5) because, although Plaintiff acted to avoid the current outcome before a final order had been entered, the Court, nonetheless issued it order without consideration of many of the key facts and the application of law to those facts, and Plaintiff believes the Court's legal findings relating to Due Process, and that the Court's current judgment is "dead wrong"; for one reason, because due to its using [a usurped authority] for its various rulings. See Court Docket Number (Dkt.) in 02cv743, Dkt.'s # 155, 156 and 157, the Court's

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[5]The Court acted without constitutional authority (Art. III as well as a statutory requirement) when it acted without the U.S. Attorney issuing "scope of employment certifications" giving the Court its "subject-matter jurisdiction" to act. Acting without subject-matter jurisdiction, all of its actions and rulings are a nullity.

Memorandum and Order granting [Dkt. # 121] Defendant's Motion to Dismiss and for Summary Judgment and denying [145] Plaintiff's Motion to Strike; and denying all other pending motions are denied as moot, signed by Judge Rosemary M. Collyer on 3/20/08. See also Plaintiff's Memorandum in Support of Motion for Reconsideration, Dkt # [159] re Dkt. # [157] Order, Dkt. # [155] Memorandum & Opinion, signed by Judge Rosemary M. Collyer on 3/20/08, are incorporated and referenced as support as fully set fort herein, and attached as Exhibit A hereto..

In sum, because Plaintiff claims regarding Plaintiff 2001, 2002, and 2003 alleges and/are continuing torts violations under DC law, and the Court, using [a usurped authority] [a nonexistent subject-matter jurisdiction] for its various referenced rulings, erroneously and unlawfully applied the wrong standard in adjudicating and resolving Plaintiff claims and case on summary, as to all of plaintiffs' 2001, 2002 and 2003 FTCA claims, they were not time-barred, and defendant's motion to dismiss, based on the Judges' and the Court's exercise of usurped authority, must be reverse and denied as invalid, null and void ab initio - with judgment rendered in favor of the Plaintiff. As to the honorable RJL's Sua Sponte Memorandum Order of Dismissal, Plaintiff herein alleges and charges, is a known, intentional and willful continued conspiracy to join and to support and continues to aid the alleged conspiracy and unlawful acts, omissions and actions of the Judges and other named and un-named defendants in this and related cases and constitutes obvious bias and a lack of impartiality, and Plaintiff also herein ask the current presiding Honorable RJL to respectfully recuse himself from this case, because of his obvious bias, lack of impartiality and conflict of interest in sau sponte dismissing only his colleague Judges, and to do this without Plaintiff's supporting affidavit, or as under a normal substitution. 28 U.S.C. (the judicial code) with respect to court proceedings provides two sections of providing standards for judicial

disqualification or recusal. Under 28 U.S.C. § 455, captioned Disqualification of justice, judge, or magistrate judge," provides that a federal judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The same section also provides that a judge is disqualified "where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding", e.g., [facts pertaining to Plaintiff's FTCA claims and the judges' claimed usurped authority rulings] and [Plaintiff's district court and appellate court complaint allegations] on the issue of this Court's subject-matter jurisdictional authority to act in this and the subject FTCA claim]]; when the judge has previously served as a lawyer or witness concerning the same case or has expressed an opinion concerning its outcome, e.g., [the Honorable Judge RJL's Memorandum Order of Dismissal Ruling]; or when the judge or a member of his or her immediate family has a financial interest in the outcome of the proceeding. 28 U.S.C. §144, captioned "Bias or prejudice of judge," provides that under circumstances, when a party to a case in a United States District Court files a "timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of an adverse party," the case shall be transferred to another judge. The Judge's Memorandum Order of Dismissal, dismissing the named judge defendants in this action should be reconsidered, overturned or reversed and the named judges' should be restored and remain defendants in this case.

CONCLUSION

For all the foregoing and following reasons, the court should (1) Grant the Plaintiff's motion for reconsideration of the Court's Memorandum Order of Dismissal, (2) Reverse or Vacate the Order and Restore Defendant Judges as Defendants to the Complaint, or in the Alternative, (3) Grant

Plaintiff Leave of the Court to File Third Amended Complaint Naming the Honorable Judge (RJL) as a Defendant, (4) Reassign the Case to Another Judge who will act with bias or prejudice, or in the Alternative, (5) Certify this Case for Appeal to be Joined With a Related Case Already on Appeal to the United States Court of Appeals for the District of Columbia Circuit, Case # 08-5349; because the named United States Judges are not immune from the plaintiff's claims, under our U.S. Constitution, "*Bivens*" and Federal Statue 28 U.S.C. § 1331, (the court shall have subject matter jurisdiction). The Court's application of Rule 12(h)(3), Federal Rule Civil Procedure, to the facts of this case was inappropriate, based on (3) "whenever it appears that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

Respectfully Submitted,

-S-

December 20, 2008

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1 Attachment: Exhibit A, as

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of December 2008, I caused a copy of Plaintiff above Motion for Reconsideration to Alter or Amend the Court's Memorandum Order of Dismissal, dated December 11, 2008, to be served on the following individual:

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Oscar L. Thomas	)	
	)	
- Plaintiff,	)	
	)	
v.	)	Civil Action # 02-0598 (RJL)
	)	
R. James Nicholson et al	)	
	)	
- Defendants.	)	

MEMORANDUM OPINION
(September 25, 2009 [#45]

Before the Court is defendants' Motion to Dismiss. Plaintiff Oscar Thomas ("Thomas" or "Plaintiff"), proceeding *pro se*, opposes the motion. Because Thomas has failed to state any actionable claims, defendants' motion must be GRANTED.

BACKGROUND

By now this Court is quite familiar with Thomas and the claims he seeks to pursue. Thomas is a retired Army veteran who has repeatedly sought benefit payments from the Department of Veterans Affairs ("VA") and has already sued the VA once before.[1] In 2002, Thomas filed a complaint against the Secretary of VA based on a 1991 visit to a VA doctor and subsequent visits to the VA Medical Center. *See Thomas v.*

[1] Plaintiff seeks to sue, among others, the Secretary of the Department of Veterans Affairs. Pursuant to Federal Rule of Civil Procedure 25(d), if a public officer named as a party to an action in his official capacity ceases to hold office, the court substitutes Eric K. Shinseki for his predecessor, the previously-named defendant, Oscar Nicholson.

Nicholson, 539 F. Supp. 2d 205, 208 (D.D.C. 2008) (Collyer, J.) ("the FTCA litigation"). My colleagues' dismissal of that complaint is the subject of this suit.

The crux of Thomas's 2002 complaint was that he had been improperly denied benefits as a result of the VA faulty medical treatment. Specifically, Thomas alleged that the VA doctor he saw in 1991 thought it likely that he suffered from schizophrenia, but did not formalize this belief in a final diagnosis. *See id.* at 209, Because Thomas was not technically diagnosed with schizophrenia, the VA ruled him ineligible for certain disability benefits. *See id.* The District Court dismissed the FTCA litigation in 2003, and on appeal, our Circuit Court affirmed dismissal of Thomas's benefit claims by remanded his tort claims. *See id.* at 209-10.

Not surprisingly, Thomas continued the FTCA litigation by filing an amended complaint in 2006. See id. After reviewing his remanded tort claims, however, the District Court dismissed his case on March 20, 2008, *see id.*, and denied to reconsider, *see Thomas v. Nicholson*, 561 F. Supp. 2d 1, 2 (D.D.C 2008). Once again, Thomas appealed, but this time he was unsuccessful because our Circuit affirmed the District Court's ruling under the Federal Torts Claim Act ("FTCA"). *See Thomas v. Shinseki*, No. 08-5349, slip op. at 1-2 (D.C. Cir. May 7, 2009)

In the interim period between filing his amended complaint in the FTCA litigation and challenging its dismissal to the Court of Appeals, Thomas filed this additional suit on March 28, 2007. Even though the FTCA litigation was still pending, Thomas alleged in this new case that the judges involved in the FTCA litigation, along with the Assistant united States Attorneys who defended against it, a VA attorney, the Secretary of the VA, and other VA employees, all conspired to deprive him of his constitutional rights and to commit various torts against him by participating in that case. The judges were dismissed from this case on the grounds that they had an absolute immunity for judicial acts committed with

their jurisdiction. (See Memorandum Order [#38] at 2.[2]). The remaining defendants move in turn to dismiss the balance of plaintiff's case. For the following reasons, their motion is GRANTED.

ANALYSIS

The eight counts in Thomas's Second Amended Complaint can be separated into categories. First, there are the constitutional tort claims alleged in counts One and Two.[3] Second, there are the common law torts alleged in Court Three, Six, Seven, and Eight.

As to the first category, Thomas's constitutional tort claims must be dismissed because the remaining defendants are also immune from them. In general, government officials cannot be sued for constitutional tort damages based on their performance of discretionary functions. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Such immunity is qualified, and government actors who violate clearly established constitutional rights cannot benefit for it. See *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Thus, courts must determine whether a constitutional violation occurred, and if so, whether the right that was violated was clearly established. Courts have discretion to address either of these questions first. *Pearson v. Callahan*, 129 S. t. 808, 818 (2009).

In this case, there is no need to go beyond the first question because has failed to allege any constitutional violation. He attempts to characterize defendants' action as a violation of his constitutional "right to access" the court. Unfortunately, he is mistaken. "To establish a right of access claim, a plaintiff must show that he was hindered in pursuing a cognizable legal claim." *Harrison v. Lappin*, 510 F. Supp. 2d

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[2] Aff'd No. 09-5138 (D.C. Cir. Aug. 19, 2009 (unpublished).

[3] Court Four and Five allege constitutional torts as well, but only against judge-defendants who have already been dismissed; accordingly, those counts are no longer pending.

153, 156 (D.D.C. 2007) (citing *Lewis v. Casey*, 518 U.S. 343, 351 (1996). Simply put, he must show that he "actually lost...[an] otherwise valid legal claim [or] that he is unable to raise such a claim in any other proceeding." *Ali v. District of Columbia*, 278 F.3d 1, 8 (D.C. Cir. 2002). Thomas has not done so here!

Thomas's contention, in essence, is that he was denied access to the courts when the FTCA litigation was dismissed. (Pl. Opp'n at 40.) Thankfully, being unhappy with the outcome of litigation doe not amount to suffering a constitutional violation. Indeed, it would be difficult for Thomas to make the requisite showing - that he lost a valid legal claim - given that our Circuit Court affirmed the dismissal of both his benefits claims and tort claims. Moreover, Thomas neither showed, nor even suggested, that he was somehow prevented from raising valid claims. If anything, the history and procedural posture of his case demonstrate that he has been afforded repeated opportunities to litigate his claims, both at the District and Circuit Court levels, notwithstanding their obvious lack of merit.

As t the second category, Thomas's common law tort claims fare no better. Thomas attempts to sue defendants in their individual capacity for fraud, conspiracy to commit fraud, and intentional infliction of emotional distress. The Department of Justice, however, has certified that all f the defendants acted within the scope of their employment at the time of the conduct alleged in his complaint. (Def. reply at 2.) Accordingly, the defendants are immunized from these claims and Thomas's suit, at best, must be converted into an FTCA action against the United States Government, however, is equally to no avail because Thomas has not exhausted his administrative remedies, as required by 28 U.S.C. § 2675(a). Accordingly, Thomas's FTCA suit against the Government must also be dismissed.

Thus, for all of these reasons, defendant' Motion to Dismiss is GRANTED. An appropriate Order will accompany this Memorandum Opinion.

RICHARD J. LEON
United States District Judge

Article III

Section 1. The judicial power of the United States, shall be vested in the Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Section 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;–to all cases affecting ambassadors, other public ministers and consuls;–to all cases of admiralty and maritime jurisdiction;–to controversies to which the United States shall be a party;–to controversies between two or more states;- between a state and citizens of another state;–between citizens of different states;–between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not

committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

Section 3. Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

The Veterans' Judicial Review Act (VJRA) of 1988, 38 U.S.C, § 511(a), which states:

The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. The decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise. 38 U.S.C. § 511(a)

28 U.S.C. § 1346(b)(1), states:

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. 28 U.S.C. §§ 2671-2680

28 U.S.C. § 2679(d) (1) of The Federal Employees' Liability Reform and Tort Compensation Act of 1988 (the "*Westfall Act*"), 28 U.S.C. § 2679, states:

Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.